Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JEFFREY HERSON, DBA BYNX and
DBA OUTDOOR MEDIA DIMENSIONS INC.,

Petitioners,

v.

DRIVER AND MOTOR VEHICLE
SERVICES BRANCH (DMV),

Respondent.

**On Petition For Writ Of Certiorari
To The Court Of Appeals
Of The State Of Oregon**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do content-based distinctions that regulate signs by giving greater protection to commercial speech than noncommercial speech violate the First Amendment of the United States Constitution?

2. Does the regulation of noncommercial speech based upon the content of the speech violate the First Amendment of the United States Constitution?

3. Do the procedural requirements of a prompt administrative decision on an application for a permit to engage in an activity protected by the First Amendment and prompt judicial review upon a denial of the application apply to a content-neutral statute regulating the display of signs?

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PETITION FOR WRIT OF CERTIORARI

Jeffrey Herson, dba BYNX and dba Outdoor Media Dimensions Inc., ("OMD"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Oregon Court of Appeals entered in this proceeding on December 23, 1998, in order to resolve conflicts on two important issues as to whether two plurality opinions of this Court state appropriate First Amendment analyses.

OPINION BELOW

The opinion of the Oregon Court of Appeals that gives rise to this petition is *Herson v. DMV*, 157 Or. App. 683, 971 P.2d 492 (1998). That opinion relies upon a previous opinion of that court, *Outdoor Media Dimensions Inc. v. State of Oregon*, 150 Or. App. 106, 945 P.2d 614 (1997), *aff'd on other grounds*, 331 Or. 634, 20 P.3d 180 (2001).

JURISDICTION

The Oregon Supreme Court denied review of this case on April 17, 2001. The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

The First Amendment to the United States Constitution provides, in part:

"Congress shall make no law * * * abridging the freedom of speech * * * ."

The Fourteenth Amendment to the United States Constitution provides, in part:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law * * * ."

The Oregon Motorist Information Act, (the "OMIA"), as it appeared in the 1991 version of the Oregon Revised Statutes, commences at ORS 377.700.

ORS 377.715 provides, in part:

"A person may not erect or maintain an outdoor advertising sign * * * visible to the traveling public from a state highway, except where permitted outside the right of way of a state highway, unless it complies with the provisions of ORS 377.505 to 377.545, 377.700 to 377.840 * * * ."

ORS 377.710 provides, in part:

"(22) 'Outdoor advertising sign' means a sign which advertises:

(a) Goods, products or services which are not sold, manufactured or distributed on or from the premises on which the sign is located; or

(b) Facilities not located on the premises on which the sign is located."

ORS 377.725 provides, in part:

"(1) Unless an annual permit has been issued therefor, an outdoor advertising sign or a

directional sign shall not be erected, maintained or replaced by any person.

"(2) A person may apply for a permit to the director on forms furnished by the director. The permit application shall include a precise description of the sign and such other information as the director considers necessary or desirable to determine compliance with ORS 377.700 to 377.840. The director shall issue a permit for a sign that complies with ORS 377.700 to 377.840. A valid permit may be transferred to another person upon written notice to the director."

ORS 377.735 provides, in part:

"(1) If applicable federal regulations are met, the permit requirements of ORS 377.700 to 377.840 do not apply to:

"(a) Signs with an area of not more than 260 square inches identifying motor bus stops or fare zone limits of common carriers.

"(b) Signs erected and maintained by a city showing the place and time of services or meetings of churches and civic organizations in the city; however, not more than two such signs may be erected and maintained that are readable by the traveling public proceeding in any one direction on any one highway.

"(c) Residential directional signs along highways other than fully controlled access highways; however, this paragraph does not apply if a professional, commercial or business activity is maintained at the location and the sign indicates its existence.

"(d) Official traffic control signs.

"(e) Signs of a governmental-unit including but not limited to regulatory devices, legal notices or warnings.

"(f) Small signs displayed for the direction, instruction or convenience of the public, including signs which identify rest rooms, freight entrances, posted areas or the like, with total surface area not exceeding four square feet.

"(g) Signs maintained for not more than two weeks announcing an auction or a campaign, drive or event of a civic, philanthropic or educational organization.

"(h) Memorial signs or tablets.

"(i) Signs maintained for not more than six weeks by state and county fairs, rodeos, roundups and expositions.

"(j) Directional signs maintained temporarily to provide directions to places of business offering for sale agricultural products harvested or produced on the premises where the sale is taking place.

"(k) A sign advertising the sale of real estate by the owner or agent of the owner and erected on the advertised premises.

"(L) Signs warning of hazards or danger on the property upon which they are located, or warning against hunting, fishing or trespassing upon such property.

"(m) Signs approved by the director and erected by a utility or common carrier for the purpose of notices necessary for the information, safety or direction of the public.

"(n) Church directional signs not to exceed six square feet in size, installed on private property.

"(o) Temporary political signs erected or maintained by candidates or political committees on private property, if the sign area does not exceed 32 square feet and if the sign is removed within 30 days after the date of the election for which erected."

ORS 377.767 provides, in part:

"A permit shall be issued for the relocation of an outdoor advertising sign lawfully erected in a commercial or industrial zone in existence on June 12, 1975, if the site lease for said sign is terminated for any reason. The existing sign may be relocated in any commercial or industrial zone upon the following conditions. . . . "

ORS 377.992 provides, in part:

"(1) A person who violates any provision of ORS 377.700 to 377.840 and this section or any regulation of the Travel Information Council adopted pursuant thereto shall upon conviction be fined not more than $100 or imprisoned for not more than 30 days, or both."

STATEMENT OF THE CASE

OMD desired to display several outdoor advertising signs. The OMIA requires that OMD first obtain a permit from the Oregon Department of Transportation, ("ODOT.") The permit that ODOT required of OMD is the permit provided for in ORS 377.767.

OMD, without applying for a permit, displayed several outdoor advertising signs in violation of the OMIA. ODOT ordered that these signs be removed because they were installed without permit authority.

OMD requested and was granted an administrative hearing. At the administrative hearing, OMD submitted Petitioner's Hearing Memorandum to the hearing officer. (Exhibit 11; Item 42.) The Hearing Memorandum asserted the "Metromedia Argument" that Oregon's regulation of signs violated the First and Fourteenth Amendments in that it gives greater protection to commercial speech than noncommercial speech and permits some noncommercial speech in places where other noncommercial speech is prohibited. (Exhibit 11; Item 42, pages 14-18.)

OMD also argued that Oregon's requirement of a permit is unconstitutional because its procedures do not provide for a prompt administrative decision on an application for the permit and prompt access to the courts on the denial of the application. As a result, OMD asserted, that, since the procedure for a permit fails to meet the requirements of due process, no permit is necessary for OMD to display its signs. (Exhibit 11; Item 42, pages 26-27.)

ODOT issued its Final Order on June 12, 1997, with respect to the administrative proceeding. (Item 7, pages 21-38.) ODOT did not respond to the "Metromedia Argument." With respect to the procedural requirements, ODOT held that, since OMD had not applied for a permit, the issue is not present in the case. (Item 7, page 30.)

OMD then petitioned to the Oregon Court of Appeals for judicial review of the ODOT Final Order. (Item 8, pages 1-20.)

The Fifth Assignment of Error in Petitioner's Brief and Abstract of Record filed in the Oregon Court of Appeals states the "Metromedia Argument." (Petitioner's Brief and Abstract of Record, at 19-24.)

OMD relied upon the plurality opinion of Mr. Justice White in *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 101 S. Ct. 2882, 69 L. Ed.2d 800 (1981). That opinion states that a government may not give greater protection to commercial speech than noncommercial speech. 453 U.S. at 513. In addition, a government may not permit some noncommercial speech where it bans other noncommercial speech. 453 U.S. at 514-15.

At the Oregon Court of Appeals, OMD argued that the OMIA violated both of these rules. A sign at the site of a restaurant with a commercial message of "Hamburgers Sold Here" is not an outdoor advertising sign, and, hence, may be displayed without a permit. However, a sign at the same site with the noncommercial message of "Attend First Baptist Church" or "Ban Abortions" is an outdoor advertising sign, and, hence, banned without a permit. Accordingly, the OMIA gives greater protection to commercial speech than noncommercial speech.

Similarly, at a vacant lot, under the exemption contained in ORS 377.735(1)(g), a sign with the noncommercial message of "Attend the High School Back to School Night on October 6" may be displayed without a permit, but the noncommercial message of "Attend First Baptist Church" is banned without the permit.

The Oregon Court of Appeals adhered to its reasoning in *Outdoor Media Dimensions Inc. v. State of Oregon*, 150 Or. App. 106, 945 P.2d 614 (1997), *aff'd on other grounds*,

331 Or. 634, 20 P.3d 180 (2001). (See 157 Or. App. at 685.) In its prior case, the Oregon Court of Appeals had refused to adhere to the plurality opinion of Mr. Justice White in *Metromedia*. 150 Or. App. at 113-14. Instead, the Oregon Court of Appeals adopted the test set forth by the United States Court of Appeals for the Third Circuit in *Rappa v. New Castle County*, 18 F.3d 1043, 1067 (3rd Cir. 1994). That is, the Oregon Court of Appeals held that because the definition of "outdoor advertising sign" contained in the OMIA does not favor commercial over non-commercial advertising, there is no violation of the First Amendment. See *Outdoor Media Dimensions Inc., supra at* 114-15, 115, n.10.

The Seventh Assignment of Error in Petitioner's Brief and Abstract of Record filed in the Oregon Court of Appeals sets forth the argument of OMD with respect to the required procedural safeguards on the application for a permit. (Petitioner's Brief and Abstract of Record, at 27-34.)

OMD argued that no permit was required because the OMIA lacked the required procedural safeguards outlined in *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed.2d 649 (1965). In that case, this Court held that, in an application or a permit to engage in an activity protected by the First Amendment, the applicant must be assured by statute or authoritative judicial construction that the government will, within a specified brief period, rule on the application for the permit, and, in the event of the denial of the permit, prompt judicial review must be available. 380 U.S. at 58-59.

The Oregon Court of Appeals adhered to its reasoning in *Outdoor Media Dimensions Inc. v. State of Oregon, supra.* (See 157 Or. App. at 685.) In the prior case, the Oregon Court of Appeals concluded that the procedural requirements do not apply to content-neutral statutes. 150 Or. App. at 119-22.

REASONS FOR GRANTING THE WRIT

I. The opinions of the Oregon Court of Appeals in this case and those of the Third Circuit and Fourth Circuit directly conflict with opinions of the First Circuit, Second Circuit, and Ninth Circuit as to whether the test set forth by Mr. Justice White in *Metromedia, supra,* is an appropriate test under the First Amendment.

In *City of Ladue v. Gilleo,* 512 U.S. 43, 114 S. Ct. 2038, 129 L. Ed.2d 36 (1994), this Court stated that the analysis in Mr. Justice White's plurality opinion in *Metromedia, supra,* is an appropriate test of a government regulation of the display of signs. Nevertheless, the Oregon Court of Appeals refused to apply that test.

Prior to *City of Ladue v. Gilleo, supra,* both the Second Circuit and Third Circuit also failed to apply this test. See *Rappa v. New Castle County, supra; National Advertising Co. v. City of Raleigh,* 947 F.2d 1158 (4th Cir. 1991), *cert. denied,* 504 U.S. 931 (1992).

However, other courts of appeal have adopted the test set forth by Mr. Justice White. See, e.g., *Matthews v. Town of Needham,* 764 F.2d 58 (1st Cir. 1985); *National Advertising Co. v. Town of Babylon,* 900 F.2d 551 (2nd Cir.

1990), *cert. denied*, 498 U.S. 852 (1990); *National Advertising Co. v. City of Orange*, 861 F.2d 246 (9th Cir. 1988).

The conflict among the courts is clear and irreconcilable. This case gives the Court the opportunity to state the appropriate test to be used in determining whether the regulation of signs is consistent with the First Amendment. Certiorari is appropriate.

II. The opinion of the Oregon Court of Appeals in this case that the procedural requirements on an application for an activity protected by the First Amendment do not apply to content-neutral statutes conflicts with the plurality opinion in *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed.2d 603 (1990), and conflicts with the opinion of the Ninth Circuit in *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993), which holds that the procedural requirements do not apply to signs.

The plurality opinion in *FW/PBS, Inc. v. Dallas, supra* at 228, states that, in considering an application for a license to engage in a First Amendment-protected business, the government must be required to make the decision within a specified and reasonable period of time, and there must be the possibility of prompt judicial review.

The plurality opinion further states that these requirements apply to even content-neutral statutes. *Id.*, at 223.

The Oregon Court of Appeals, however, adhered to its prior opinion in *Outdoor Media Dimensions Inc. v. State*

of Oregon, supra at 119-22, holding that these requirements do not apply to content-neutral statutes.

Another view is held by the Ninth Circuit. The rule in the Ninth Circuit is that these procedural requirements do not apply to applications for permits to display signs. See *Outdoor Systems, Inc. v. City of Mesa, supra* at 613.

Thus, this case gives the Court the opportunity to state whether the procedural requirements apply to content-neutral regulations, and whether they apply to all activities protected by the First Amendment. Certiorari is therefore appropriate.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE COURT OF APPEALS
OF THE STATE OF OREGON

Jeffrey HERSON, dba BYNX, dba Outdoor Media Dimensions Inc., *Petitioner,*

v.

DRIVER AND MOTOR VEHICLE SERVICES BRANCH (DMV), *Respondent.*

(DMV Nos. 53190, 50346, 50347, 52290, 52293, 54811, 53752, 54021, 54581, 56088 and 49403; CA A98243)

Judicial Review from Oregon Department of Transportation, Driver and Motor Vehicle Services Branch (DMV).

Argued and Submitted March 3, 1998.

Alan R. Herson argued the cause and filed the briefs for petitioner.

Rives Kistler, Assistant Attorney General, argued the cause for respondent. With him on the brief were Hardy Myers, Attorney General, and Michael D. Reynolds, Solicitor General.

Before Landau, Presiding Judge, and Deits, Chief Judge,* and De Muniz, Judge.

DE MUNIZ, J.

Affirmed.

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* Deits, C.J., *vice* Riggs, J., resigned.

DE MUNIZ, J.

Petitioners[1] seek judicial review of an order issued by the Oregon Department of Transportation, Driver and Motor Vehicle Services Division (ODOT).

The order arises from the Oregon Motorist Information Act (Act), ORS 377.700 *et seq.*, which regulates billboards along state highways, and was issued following a contested case hearing conducted by ODOT, pursuant to ORS 377.775(3)(a). Following the hearing, ODOT ordered petitioners to remove a series of billboards they had erected along state highways in Jackson and Josephine Counties. We affirm.

Petitioner Outdoor Media Dimensions Inc. was the plaintiff in *Outdoor Media Dimensions Inc. v. State of Oregon*, 150 Or. App. 106, 945 P.2d 614 (1997), *rev. allowed* 326 Or. 627, 964 P.2d 1029 (1998). Petitioners here make nine assignments of error. *Outdoor Media* resolved all but portions of three of those assignments in a manner adverse to petitioners here. We adhere to those rulings. We write only to address the issues not resolved in that case.

One of the arguments in petitioners' third assignment of error[2] claims that, in permitting temporary political signs, but only for candidates and political committees,

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[1] Although in this case petitioner is designated in the singular (Herson), the final order being appealed here arises from a DMV case and several consolidated DMV cases where petitioners were designated, in the plural, as Herson and two of his dbas, a designation that petitioner has adopted throughout the briefing in this court, and therefore so do we.

[2] The other two arguments raised under this assignment of error were resolved in *Outdoor Media* against the position petitioners advance here.

ORS 377.735(1)(o) violates Article I, section 20, of the Oregon Constitution. They argue that, without a permit, they cannot display a political sign because they are not candidates or a political committee. The state responds that, even if petitioners were correct, petitioners did not attempt to display a political sign, and, therefore, have not been denied a privilege or immunity. We agree with the state that, "[t]o prove a violation of the [Privileges and Immunities] [c]lause, a defendant must first show that he was denied a privilege or immunity." *State v. Scott*, 96 Or. App. 451, 455, 773 P.2d 394 (1989). Petitioners failed to make that kind of showing here.

Petitioners' fourth assignment of error challenges the impartiality of the hearings officer. Specifically, they claim that the hearings officer had a financial interest in the outcome of the case because, under federal law, ODOT stood to lose 10 percent of the state's federal highway funds should the Act be held unconstitutional. Petitioners, however, made only a brief reference to the issue during the hearing. They did not make an objection on that ground before or at the beginning of the hearing and failed to make a factual record on the issue. Under these circumstances, we conclude that the issue is not preserved or presently capable of review. *Llewellyn v. Board of Chiropractic Examiners*, 318 Or. 120, 127, 863 P.2d 469 (1993). We therefore decline to address it here.

Petitioners' eighth assignment of error asserts that ODOT erred in failing to hold that the standards set forth in the Act are not susceptible to objective measurement. Particularly, petitioners argue that the Act is so vague that its enforcement violates petitioners' rights to freedom of speech and due process under the United States

Constitution. Many of the statutory terms petitioners cite were also challenged unsuccessfully for vagueness in *Outdoor Media*. Here, petitioners assert that the term "state highway" is vague on the ground that ODOT's own map shows that McAndrews Road, the site of one of petitioners' signs, is not a state highway.

The state responds that the purpose of the map is to guide travelers, not to define "state highway" for statutory purposes. We agree. "State highway," in fact, refers to

> "the entire width between the boundary lines of the right of way of every state highway, as defined by ORS 366.005, and the term[ ] also include[s] the interstate system and the federal-aid primary system." ORS 377.710(34).

ORS 366.005 states that "any road or highway designated as such by law or by the Oregon Transportation Commission pursuant to law" is a state highway. "State highway," therefore, is neither undefined nor vague.

Affirmed.

IN THE COURT OF APPEALS OF THE STATE OF OREGON.

OUTDOOR MEDIA DIMENSIONS INCORPORATED, an Oregon corporation,
Appellant,

v.

STATE OF OREGON, Jimmy L. Odom, Julie Evey, and Henry Montes,
Respondents.

(94-3953-L2; CA A91779.)

Appeal from Circuit Court, Jackson County

Loren L. Sawyer, Judge.

Argued and Submitted January 13, 1997.

Alan R. Herson argued the cause and filed the briefs for appellant.

Rives Kistler, Assistant Attorney General, argued the cause for respondent. With him on the brief were Theodore R. Kulongoski, Attorney General, and Virginia L. Linder, Solicitor General.

Before Deits, Presiding Judge, and De Muniz and Haselton, Judges.

DE MUNIZ, J.

Affirmed.

DE MUNIZ, J.

Plaintiff appeals from a summary judgment on its claims for conversion, deprivation of civil rights, 42 U.S.C. section 1983, and declaratory and injunctive relief, in which it raised several constitutional challenges to Oregon's billboard statute. We affirm.

Plaintiff is a corporation that owns three billboards. Its conversion and civil rights claims pertain only to the first billboard, and its declaratory and injunctive relief claims relate to the second and third billboards. On appeal, plaintiff makes 22 assignments of error, many of which address overlapping issues. For the sake of clarity and organization, we address plaintiff's claims in the order that they were pled.

The first billboard was installed along Route 62 in Jackson County, Oregon. Plaintiff placed a religious message on one side and an advertisement for a radio station on the other. On February 19, 1993, the Department of Transportation (department) notified plaintiff that its billboard violated the Oregon Motorist Information Act (OMIA). ORS 377.700 to 377.840 and ORS 377.992.

The OMIA generally prohibits the installation or maintenance of any "outdoor advertising sign" or any "directional sign" visible to motorists traveling on state highways, unless it complies with the OMIA, state administrative rules and federal law, or unless it existed in a commercial or industrial zone on June 12, 1975. ORS 377.715; ORS 377.765(1).[1] "Outdoor advertising signs" are

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[1] ORS 377.712(1) provides:

"Notwithstanding the provisions of ORS 377.700 to 377.780, the owner of any outdoor advertising sign in existence on June 12, 1975, located in a commercial or industrial zone in existence on June 12, 1975, that meets all requirements for obtaining an outdoor advertising sign permit as set out in ORS 377.700 to 377.780 and for which the owner had not secured an outdoor advertising permit as required by ORS 377.725 prior to June 12, 1975, either because of

signs that advertise "[g]oods, products or services which are not sold, manufactured or distributed on or from the premises on which the sign is located," ORS 377.710(22)(a), or those that advertise "[f]acilities not located on the premises on which the sign is located," ORS 377.710(22)(b) (*i.e.*, off-premises signs).

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ignorance of the requirements of ORS 377.725 or because the area, road or street adjacent to which the sign was situated was not, at that time, designated as a state highway, shall be entitled to the issuance of an outdoor advertising sign permit by the division upon application by the owner of the sign and the payment of the fee set out in ORS 377.729."

ORS 377.765(1) provides:

> "Outdoor advertising signs in existence on June 12, 1975, and lawfully located within commercial or industrial zones in existence on June 12, 1975, and outdoor advertising signs visible from a road or street that is designated as a state highway after February 19, 1990, lawfully located within a commercial or industrial zone at the time of designation as a state highway, may remain. Subject to the provisions of ORS 377.700 to 377.840, such signs may be maintained, reconstructed and relocated. However, such signs shall not be relocated unless a relocation permit has been issued therefor pursuant to ORS 377.767. No permit may be issued to relocate an outdoor advertising sign that was not in existence on June 12, 1975, except that signs that are visible from a road or street that is designated as a state highway after February 19, 1990, and that were lawfully located within a commercial or industrial zone at the time of designation as a state highway, may be relocated within the same section of the road or street."

If an outdoor advertising sign existed in a commercial or industrial zone on June 12, 1975, the owner may obtain a permit and allow the sign to remain without violating the statute. ORS 377.712(1); ORS 377.725(2) and (14).[2] Permits may be transferred from one person to another, and signs may be relocated either within a commercial or industrial zone or to another commercial or industrial zone, subject to geographic limitations. ORS 377.725(2); ORS 377.767.

The department's notice alleged that plaintiff's billboard violated the OMIA because it was a newly erected off-premises sign for which no permit had been granted and for which no permit can be issued, *i.e.*, it "advertises an activity which is not at the location of the sign," and it was visible from a state highway. The notice further stated that if plaintiff did not request a hearing, or correct or remove the sign within 30 days of the date of the notice, the sign would be subject to removal, and plaintiff would be billed for removal costs.

Plaintiff did not request a hearing but instead attempted for several months without success to obtain a permit.[3] In April 1994, plaintiff removed both signs from

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[2] ORS 377.735 provides exemptions from the permit requirement for 15 particular types of signs, including signs identifying bus stops, city signs showing times and places of church services and civic organization meetings, residential directional signs, official traffic control signs, temporary signs announcing charity drives or auctions, memorial signs or tablets, temporary signs announcing state and county fairs and rodeos, "for sale" signs, church directional signs, and temporary political signs, among others.

[3] In an affidavit, plaintiff's president alleged that a department employee told him that the notice of violation was

the billboard. On September 5, 1994, the department hired a contractor to dismantle and remove the billboard structure. Plaintiff then filed this action, alleging conversion of the structure, among other claims. The department subsequently gave plaintiff permission to retake possession of the structure, which plaintiff did. However, the department billed plaintiff $962.50 in removal costs. In its second amended complaint, plaintiff realleged a conversion and also sought a declaratory judgment that it was not liable to the department for removal costs. The department moved for summary judgment, which the trial court granted.

The department is entitled to summary judgment under ORCP 47 if the pleadings, depositions and affidavits show that there is no genuine issue of material fact, and that the department is entitled to judgment as a matter of law. *Hamilton Properties, Inc. v. Associated Grocers*, 144 Or.App. 171, 176, 925 P.2d 1237 (1996). On review, we view the record in the manner most favorable to plaintiff to determine whether an objectively reasonable juror could return a verdict for plaintiff on the summary judgment evidence. *Barber v. George*, 144 Or.App. 370, 372, 927 P.2d 140 (1996), *rev den* 324 Or. 560 (1997). Because the facts underlying plaintiff's first claim are undisputed, there are no genuine issues of material fact, and we need only determine whether the department was entitled to judgment as a matter of law. *FOPPO*

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moot and plaintiff should not request a hearing because plaintiff was seeking a permit. However, on appeal, plaintiff does not argue that its reliance on the employee's remarks somehow excused its failure to request a hearing.

v. State of Oregon, 144 Or.App. 535, 539, 928 P.2d 335 (1996); *Mitchem v. Rice*, 142 Or.App. 214, 217, 920 P.2d 1121, *on recons* 143 Or.App. 546, 923 P.2d 1347, *rev den* 324 Or. 394 (1996).

Plaintiff's declaratory judgment action depends directly on its conversion claim; if there was no conversion of the billboard structure, then plaintiff is not entitled to a declaratory judgment that it was not liable for the cost of removing that structure. We therefore begin by addressing plaintiff's conversion claim.

An action for conversion lies when there has been

> "an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *Mustola v. Toddy*, 253 Or. 658, 663, 456 P.2d 1004 (1969) (quoting *Restatement (Second) of Torts* § 222a at 431 (1965)).

Generally, when property is lawfully taken, there is no conversion. *Boling v. Parrett*, 21 Or.App. 823, 825-26, 536 P.2d 1272 (1975).

The department argues that there was no conversion, because ORS 377.775 authorized the removal of the structure as a "nonconforming" sign, which is defined as a sign "that is subject to, but does not comply with," the OMIA. ORS 377.710(21).[4] ORS 377.775(3)(b) provides that, if "the sign is not made to comply or is not removed and

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[4] Although ORS 377.773 allows the removal of signs that have been blank for six months, that section did not authorize removal of this structure, which plaintiff contends had been blank for only "four or five months" at the time it was removed. On appeal, the department does not contend otherwise.

if the owner does not request a hearing within the time required," the director[5] "may remove and destroy or otherwise dispose of the sign." The department contends that the "time required" is 30 days from the date of the notice, and when plaintiff failed to seek a hearing, or correct or remove the sign by that date, the director had authority to remove it.

For purposes of its conversion claim, plaintiff apparently concedes that its billboard violated the OMIA because it was installed without a permit. It argues, however, that ORS 377.775 authorizes only the removal of noncomplying signs and that plaintiff brought its billboard into compliance by removing the religious and commercial advertising. We disagree.

It is true that once plaintiff removed the advertising, the billboard was no longer an "outdoor advertising sign" as defined by ORS 377.710(22). However, that did not bring the billboard into compliance with the statute. ORS 377.775(3) gave plaintiff 30 days from the date of the notice to make the sign comply, remove it or request a hearing. As noted, plaintiff did not request a hearing. Compliance means obtaining a permit, ORS 377.725, and removal of the "sign" means removal of the "structure." *See* ORS 377.710(29) and (33) ("sign" includes "the sign structure," which means "the supports, uprights, braces, framework and display surfaces of a sign").[6] Plaintiff

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[5] "Director" means the Director of Transportation. ORS 377.710(8).

[6] We note that one of the policies underlying the OMIA is to "preserve the natural beauty and aesthetic features of [the state's] highways and adjacent areas." ORS 377.705. A blank

took none of these actions within the required time period, and the department therefore had authority to remove the entire billboard structure, whether or not plaintiff had removed the display advertising.[7]

Plaintiff does not argue that the department's 14-month delay in acting otherwise divested it of that authority. Furthermore, plaintiff's constitutional challenges to the OMIA itself are confined to its second and third claims – that is, plaintiff does not contend that the department effected a conversion because the provisions of the OMIA on which it relied are unconstitutional. Accordingly, there was no conversion, and the department was entitled to judgment as a matter of law on that claim. Because the department had authority to remove the structure, plaintiff also was not entitled to a declaratory judgment that it was not liable for the department's cost of removing it. Summary judgment was therefore proper on the entire first claim.

Plaintiff next argues that the trial court erred in granting summary judgment on its second claim, a civil rights action brought under 42 U.S.C. section 1983 against three department employees. Plaintiff alleged that Odom,

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billboard is just as contrary to that purpose as is a billboard with advertising.

[7] Although plaintiff's president alleged in an affidavit that a department employee told plaintiff that if it took down the radio ad the billboard structure would not be removed, plaintiff does not argue on appeal that its reliance on that advice somehow deprived the department of authority to remove the structure. Plaintiff only argues that its removal of the advertising brought the structure into compliance with the OMIA.

Evey and Montes (defendants), acted under color of law in depriving plaintiff of its constitutional rights by ordering the radio advertisement removed and by removing the billboard structure.

Plaintiff first asserts that it was deprived of its right to free speech, arguing that the OMIA violates the First Amendment[8] under *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), a plurality opinion addressing a billboard law similar to the OMIA.

In *Metromedia*, the Supreme Court considered a city ordinance that permitted billboards advertising goods and services available on the property where the sign was located and prohibited those advertising goods or services produced or offered elsewhere. The ordinance also provided 12 exceptions to the general prohibition for particular types of signs, whether on-site or off, including government signs, historical plaques, religious symbols, "for sale" or "for lease" signs, and temporary political signs, among others. 453 U.S. at 493-96.

Four justices reasoned that the on-site exception applied only to commercial advertising, and, because there was no similar exception for noncommercial signs, the ordinance impermissibly favored commercial over noncommercial speech in violation of the First Amendment. 453 U.S. at 513. Those same justices also would have held the ordinance unconstitutional because the 12 exceptions amounted to a content-based restriction. *Id.* at

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[8] The First Amendment provides:

"Congress shall make no law * * * abridging the freedom of speech[.]"

514-16. Under the *Metromedia* plurality, plaintiff argues, the OMIA violates the First Amendment because it provides greater protection to commercial speech than to noncommercial speech and allows "some noncommercial speech in places where other non-commercial speech is prohibited."

Plaintiff's reliance on *Metromedia* is questionable. That decision failed to garner a majority; only four justices subscribed to the plurality opinion cited by plaintiff, while two concurring justices and three dissenters relied on completely separate analyses.[9] As the Third Circuit noted:

> "The *Metromedia* decision was badly splintered, producing five separate opinions. * * * [I]t is difficult to divine what, if any, principles from *Metromedia* became the governing standard for future cases, *i.e.*, 'the law of the land.' " *Rappa v. New Castle County*, 18 F.3d 1043, 1057 (3rd Cir.1994).

The Supreme Court has stated that when "no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.' " *Marks v. U.S.*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), *quoting Gregg v. Georgia*, 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

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[9] Plaintiff asserts that the Court later affirmed the plurality's approach in *City of Ladue v. Gilleo*, 512 U.S. 43, 114 S.Ct. 2038, 129 L.Ed.2d 36 (1994). Our reading of that case does not support plaintiff's assertion.

The only discernible principle upon which a majority of the *Metromedia* court agreed was that San Diego's aesthetic interest in avoiding visual clutter provided an acceptable justification for a content-neutral ban on billboards. *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806-07, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). We otherwise agree with the Third Circuit that *Metromedia*'s five opinions involved such varied approaches that there is "no common denominator between them" and that they "do not establish a governing standard for future cases." *Rappa*, 18 F.3d at 1058-60. Nonetheless, resolution of plaintiff's arguments does not require resort to *Metromedia*. Even assuming that the plurality's analysis is the "law of the land," it does not advance plaintiff's claim, at least under the arguments made here.

First, the OMIA does not favor commercial over non-commercial speech. Unlike the on-site exception in the *Metromedia* ordinance, which the plurality there construed as applying only to commercial advertising, the OMIA's on-premises exception applies equally to commercial and non-commercial billboards.

The OMIA generally prohibits "outdoor advertising signs," ORS 377.715, which are defined as signs that advertise goods, products, or services that are not sold, manufactured or distributed on or from the premises where the signs are located, ORS 377.710(22)(a), or that advertise facilities not located on the premises, ORS 377.710(22)(b). Conversely, if a sign advertises on-premises goods, products, services, or facilities, then it is not an "outdoor advertising sign" and is not prohibited by the OMIA. Because the definition of "outdoor advertising

sign" does not depend on the commercial or noncommercial nature of the message, the OMIA's on-premises exception does not favor commercial over noncommercial advertising.[10] *See also Rappa*, 18 F.3d at 1067 (applying same construction to Delaware billboard law).

Plaintiff nonetheless contends that the OMIA treats noncommercial speech more harshly than commercial speech because it places size and durational limits on temporary off-premises political signs, ORS 377.735(1)(o), while not similarly limiting on-premises commercial advertising.[11] Plaintiff misconstrues the statute.

As discussed, the OMIA implicitly permits *all* on-premises advertising, regardless of its message. Therefore, on-premises political signs[12] are granted the same protection as on-premises commercial signs. Off-premises advertising, on the other hand, is generally prohibited unless a permit is obtained and the sign is located in a

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[10] For example, a sign advertising gasoline prices that is installed at a gas station advertises a product that is sold on the premises. Similarly, a sign that reads "Give to the United Way" posted at a United Way office, and a sign reading "Attend the First Baptist Church," posted at the church, respectively advertise services and facilities located on the premises. The OMIA implicitly allows each of these signs, even though the first advertises a commercial message and the others noncommercial messages.

[11] As an example, plaintiff argues that the OMIA would allow a 200-foot sign reading "Shop at Sears" on a Sears store, but not a sign of the same size reading "Defeat Proposition No. 1" at the same site.

[12] An example of an on-premises political sign would be a billboard reading "Vote for Jones" that is posted at the Jones campaign headquarters.

commercial or industrial zone. ORS 377.725; ORS 377.712. The subsection cited by plaintiff, ORS 377.735(1)(o), *exempts* off-premises political signs from that prohibition but subjects them to size and duration restrictions. Off-premises political signs are allowed if the surface area does not exceed 32 square feet and if they are removed within 30 days after the election. ORS 377.735(1)(o). In that sense, political signs are granted *more protection* or treated more favorably than their commercial counterparts, which generally cannot be displayed off-premises without a permit, regardless of size or duration.[13]

As another example of the OMIA favoring commercial over noncommercial speech, plaintiff argues that a "for sale" sign would be allowed in a vacant lot, ORS 377.735(1)(k), while a sign reading "Attend First Baptist Church" would not.[14] However, ORS 377.735(1)(k) exempts "for sale" signs that are "erected on the advertised premises," and therefore allows such signs only *on-premises*. A "for sale" sign advertising some other property would therefore be prohibited as an off-premises sign, in the same manner as a sign reading "Attend First

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[13] Plaintiff does not argue that the *other* off-premises exceptions in ORS 377.735, which exempt certain "commercial" signs without imposing size or duration limits, treat commercial speech more favorably than political speech. That question was neither argued nor briefed to this court, and we do not address it. *See State v. Montez*, 309 Or. 564, 604, 789 P.2d 1352 (1990) (declining to address "guarantee clause" argument that was not adequately briefed).

[14] Plaintiff does not appear to refer to church directional signs, which are allowed off-premises without a permit. ORS 377.735(1)(o).

Baptist Church" that is not located at the church itself. We conclude that the OMIA does not favor commercial over noncommercial speech, at least as argued by plaintiff.

Plaintiff next contends that, by placing permit requirements on only "outdoor advertising signs," the OMIA unconstitutionally allows "some noncommercial speech in places where other non-commercial speech is prohibited." Plaintiff hypothesizes that signs reading "Give to the United Way" or "Attend First Baptist Church" would be prohibited in a vacant roadside lot because they advertise services or facilities not located on the premises. ORS 377.710(22). However, a billboard reading "Save the Whales" would be allowed in the same place, plaintiff asserts, because it does not advertise goods, products, services or facilities and therefore is not an "outdoor advertising sign."

We do not agree that a sign proclaiming "Save the Whales" is exempt from the OMIA simply because it does not advertise goods, products, services, or facilities. Whether such a sign is subject to the OMIA is matter of legislative intent that involves interpretation of the statute. *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610, 859 P.2d 1143 (1993). As always, we interpret a statute by first examining its text and context. *Id.* at 610-11.

Although the text of the OMIA's operative provisions generally addresses only what is *prohibited* in the absence of a permit (*i.e.*, off-premises signs), we construe them in context as also defining the limits of what is *allowed* – *i.e.*, only on-premises signs. Context includes "other provisions of the same statute." *PGE*, 317 Or. at 611. ORS 377.725(14) effectively places a cap on the number of

highway billboards in Oregon by denying permits for the installation of new billboards after June 12, 1975. Also, ORS 377.705 provides that one of the purposes of the OMIA is to "preserve the natural beauty and aesthetic features of [the state's] highways and adjacent areas." Given that language, we do not believe the legislature intended to allow the indiscriminate installation of billboards bearing messages such as "Save the Whales" simply because those signs do not advertise goods, products, services or facilities.[15]

To the extent that plaintiff is arguing that the OMIA's on-premises/off-premises distinction imposes a content-based restriction on speech, we also reject that argument.[16] Exempting billboards that advertise on-premises activity, while not similarly exempting those advertising off-premises activity, is not a *content*-based distinction. Although a billboard's *message* must be evaluated to

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[15] We note in passing that the political sign exemption, ORS 377.735(1)(o), also would not permit a generic off-premises sign reading "Save the Whales," unless that sign pertained to a "current political campaign." *Van v. Travel Information Council*, 52 Or. App. 399, 411, 628 P.2d 1217 (1981) ("Messages such as 'Support E.R.A.,' 'No Nukes' or 'Guns don't kill people – people kill people' are banned altogether from the highways.")

[16] Plaintiff does *not* argue that the exceptions in ORS 377.735 involve content-based distinctions that exempt particular off-premises signs based on their messages. *See Metromedia, Inc. v. San Diego*, 453 U.S. 514-16, 101 S.Ct. 2882, L.Ed.2d 800 (1981) (plurality viewed such exceptions as content-based and unconstitutional); *Van*, 52 Or. App. at 409, (stating that exemptions in ORS 377.735 are content-based, but not deciding their constitutionality). Because that issue was neither argued nor briefed, we decline to address it. *Montez*, 309 Or. at 604.

determine whether it relates to an activity on or off the premises, it is not the content, subject or viewpoint of that message that determines whether a permit is required. *See Van v. Travel Information Council*, 52 Or.App. 399, 408-09, 628 P.2d 1217 (1981) ("[T]he Oregon statute as a whole is not directed to content. Billboards are regulated, and in some cases banned altogether, not because of the messages they convey but because the medium of communication is itself objectionable.")

The OMIA does not require the state to evaluate competing messages in an effort to decide which subjects or viewpoints are permissible and which are not. It only requires that the billboard, whatever its content, have some relationship to the property on which it is located. Such a requirement is not content-based. The Third Circuit stated as much in addressing a similar onsite exception in Delaware's billboard statute.

> "The exception for signs advertising activities conducted on the premises * * * is constitutional * * * because it is not a content-based exception at all. Although evaluating whether a sign is an onsite sign does require the state to analyze the content of the sign, the onsite exception does not preclude any particular message from being voiced in any place; it merely establishes the appropriate relationship between the location and the use of an outdoor sign to convey a particular message." *Rappa*, 18 F.3d at 1067 (citations and footnotes omitted).

We conclude that the OMIA's distinction between on-premises and off-premises advertising is not a content-

based restriction.[17] Because plaintiff does not otherwise contend that the OMIA violates the First Amendment, we hold on this record that plaintiff was not denied its right to free speech.

As alternate grounds for its section 1983 claim, plaintiff asserts a denial of due process under the Fourteenth Amendment, arguing that the OMIA violates Article I, section 8, of the Oregon Constitution,[18] and that, even if valid, the OMIA was erroneously applied in this case. Defendants respond that a " 'mere error of state law' is not a denial of due process," *quoting Engle v. Isaac*, 456 U.S. 107, 121 n. 21, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); *Gryger v. Burke*, 334 U.S. 728, 731, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948).

We need not resolve that issue. Even assuming that plaintiff's state law claims are cognizable under 42 U.S.C. section 1983, they are without merit. Plaintiff's Article I, section 8, argument rests solely on its characterization of the OMIA as a content-based restriction. Plaintiff makes no arguments different from those it raised under its First Amendment claim, which we have already rejected, 150 Or. App. at 117-18, and does not explain how the OMIA

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[17] Defendants make no attempt to characterize the OMIA as a reasonable time, place and manner regulation of speech, and we do not decide that issue.

[18] Article I, section 8, provides, in part:

"No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever[.]"

otherwise violates Article I, section 8.[19] Plaintiff alternatively argues that it was denied due process because defendants misapplied the OMIA, which, even if valid, did not authorize removal of its billboard. We have already rejected that argument in discussing plaintiff's conversion claim. 150 Or. App. at 110-12.

Plaintiff next asserts a denial of due process under the OMIA's provisions governing relocation permits and the transfer of existing permits. The OMIA allows a person with a billboard permit to apply to move its billboard to another location, ORS 377.765, or to transfer its permit to another person, ORS 377.725(2). But there is no provision mandating how long the department has to act on an application under those sections or providing for prompt judicial review of the denial of a permit.[20] In the absence of such provisions, plaintiff argues, the OMIA constitutes a "prior restraint" on speech in violation of the First Amendment under *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

The U.S. Supreme Court has identified two types of prior restraint in this context. The first involves statutes that place "unbridled discretion in the hands of a government official or agency" and consequently make the enjoyment of constitutional rights "contingent upon the

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[19] For example, as in its First Amendment claim, plaintiff does not argue that the exceptions in ORS 377.735 are directed at the content of expression, nor does it contend that the OMIA itself is "overbroad" or "unconstitutional as applied."

[20] Plaintiff alleges that it applied for a relocation permit for its first billboard, but there is no indication when, if ever, the department acted on that application.

uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 225-26, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). The second involves laws that fail "to place limits on the time within which the decisionmaker must issue the license." *Id.* at 226. The lack of such limits amounts to a prior restraint because it "creates the risk of indefinitely suppressing permissible speech." *Id.* at 227.

Freedman addressed this second category. There, a Maryland censorship statute prohibited exhibitors from showing any film without first obtaining a license from a state censorship board, which reviewed films for obscenity, corruption of morals and incitement to crime. 380 U.S. at 52-53. The Supreme Court held the statute to be an unconstitutional prior restraint, because it failed to provide adequate procedural safeguards to ensure against the suppression of constitutionally protected speech. *Id.* at 59-60.

> "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final." *Id.* at 57-58 (footnote omitted).

To pass constitutional muster, such a statute must, among other things, require the censor either to issue or to deny a license "within a specified brief period" and provide for prompt judicial review of the denial of a

license. *Id.* at 59. The Maryland statute failed this test because it set no time limits on the censorship board's action. *Id.* at 60.

Plaintiff argues that the OMIA is similarly flawed because it does not provide that the department must approve or deny an application for a relocation permit "within a specified brief period" of time. Defendants contend that no such deadline is required because, unlike the Maryland statute in *Freedman,* the OMIA is not a content-based prior restraint on speech. We agree.

The OMIA does not require the department, in reviewing applications for relocation permits or the transfer of permits, to evaluate the content of a billboard's message to determine if it contains constitutionally protected speech.[21] The department's concern is merely with a billboard's location, or relocation, not with whether its message is fit for public consumption. Oregon's statute therefore does not present the same danger as the Maryland censorship scheme, and *Freedman*'s procedural safeguards are not required.

Plaintiff, however, relies on *Riley v. National Federation of Blind,* 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988), which addressed a North Carolina statute that required all paid charitable solicitors to obtain a license. 487 U.S. at 786-87. Although that statute apparently did not require the licensing agency to review the content of speech in determining whether to grant a license, it was

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[21] Indeed, as defendants assert, there is typically no particular message to evaluate because billboard signs are constantly changing.

nonetheless held to be an unlawful prior restraint under *Freedman* because it failed to require the issuance or denial of a license within a specified brief period of time. *Id.* at 802. *See also FW/PBS*, 493 U.S. at 229 (although ordinance regulating sexually oriented businesses did not require city to judge content of any protected speech in reviewing license applications, licensing scheme was unconstitutional in part because it provided no time limit in which decision must be made).

Plaintiff's reliance on *Riley* is misplaced. Although the statute in *Riley*, like the ordinance in *FW/PBS*, did not require content-review by an administrative official, the licensing scheme itself represented a *legislative* attempt to restrict speech on the basis of content. The statute in *Riley* applied only to paid charitable solicitations, 487 U.S. at 786-87, and the ordinance in *FW/PBS* targeted only "businesses purveying sexually explicit speech," 493 U.S. at 224. Because, as in *Freedman*, both laws involved a branch of government other than the judiciary in evaluating speech on the basis of content, the unlimited delay in obtaining judicial review amounted to an improper prior restraint.

The same concern, however, is not present here, because the OMIA's relocation and transfer provisions do not require the department to review the content of a billboard's message, nor do they represent a legislative attempt to classify and restrict speech on the basis of content. As discussed above, the OMIA's permit

requirement is not content-based,[22] 150 Or. App. at 117-18, *Van*, 52 Or. App. at 408-09, and the relocation and transfer provisions apply to all billboards, regardless of the content of their messages. *Riley* and *FW/PBS* are therefore distinguishable.[23]

Plaintiff next asserts under its section 1983 claim that the OMIA violates the Equal Protection Clause of the Fourteenth Amendment.[24] Specifically, plaintiff cites the "grandfather clause" of ORS 377.765, which grants outdoor advertising permits, on application *and* qualification, to those who owned billboards on or before June 12, 1975, but not after. Because this distinction affects the fundamental right of free speech, plaintiff contends, strict scrutiny is required.

Strict scrutiny is appropriate under the equal protection clause if a law "operates to the disadvantage of some suspect class or impinges upon a fundamental right

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[22] As noted above, plaintiff does not argue that the permit exemptions in ORS 377.735 are content based, and, for the purposes of this appeal, we do not address that argument.

[23] Plaintiff alternatively argues that a department employee *could* base a permit decision on content, for example, by denying a relocation permit because the billboard's owner is a member of [sic] political party to which the employee is opposed. The mere possibility of such an application of the OMIA does not affect the facial validity of the statute but instead implicates an "as applied" analysis. However, plaintiff neither alleged nor presented evidence that its permit application involved such a content-based decision.

[24] The Fourteenth Amendment provides, in part:

"No State shall * * * deny to any person within its jurisdiction the equal protection of the laws."

explicitly or implicitly protected by the Constitution." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 17, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973).[25] Under either a free speech or equal protection theory, if the fundamental right involved is freedom of speech, the Supreme Court has applied strict scrutiny when the law in question is content based. *Burson v. Freeman*, 504 U.S. 191, 197 n. 3, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). However, we are aware of no cases, and plaintiff cites none, that apply strict scrutiny to content-neutral regulations that only incidentally affect speech.

In *Taxpayers for Vincent*, the Court addressed a content-neutral ordinance that prohibited the posting of signs on public property. 466 U.S. at 791, 804. The ordinance was intended to serve the city's aesthetic interest in eliminating visual clutter. *Id.* at 807-08. Plaintiffs raised an equal protection-type challenge, arguing that the ordinance failed to advance that interest because it did not ban signs on private property and therefore failed "to apply to all equally unattractive signs wherever they might be located." In response, the Court did not apply strict scrutiny but instead held that the city "could reasonably conclude" that its

> "esthetic interest in the elimination of signs on public property is not compromised by failing to extend the ban to private property. The private citizen's interest in controlling the use of his

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[25] To pass strict scrutiny, a law must be "necessary to promote a compelling governmental interest" and be narrowly tailored to achieve that end. *Dunn v. Blumstein*, 405 U.S. 330, 342-43, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972).

own property justifies the disparate treatment." 466 U.S. at 811.

In applying a "reasonableness" analysis, the Court in *Taxpayers for Vincent* apparently considered the "rational relationship" test appropriate to content-neutral regulations that incidentally affect speech. Under that test, the challenged classification must "rationally further a legitimate state interest." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992). In other words, there must be a "rational relationship between the disparity of treatment and some legitimate governmental purpose," *Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993), and the challenged law must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

Because the OMIA's off-premises permit requirement is not content-based, 150 Or. App. at 117-18, we review the exception in ORS 377.765 under the rational relationship test. The stated purposes of the OMIA are highway safety, aesthetics, and the preservation of the state's recreational value, ORS 377.705, which we have held are legitimate state interests. *Van*, 52 Or. App. at 412.

The OMIA's prohibition on the installation of new billboards after June 12, 1975 rationally furthers those interests because the legislature reasonably could have concluded that placing a cap on billboards would control visual blight and make traffic signs more visible. Allowing an exception for billboards already in existence on that date under ORS 377.765 does not compromise the

validity of those interests. As in *Vincent*, the legislature could reasonably have concluded that the property interests of billboard owners "justifies the disparate treatment." 466 U.S. at 811.

Plaintiff also finds an equal protection violation in ORS 377.756, which requires the department to issue permits to "any city or county that applies or to any nonprofit or civic applicant approved by a city or county." ORS 377.756(1). Plaintiff contends that "ORS 377.756 lets 'nonprofit or civic applicants' display speech, where others, including plaintiff, may not. There can be no justification for allowing these people the right to speak where others may not."

Plaintiff baldly asserts that nonprofit or civic groups "may display any speech they want," but makes no attempt to discern what type of signs the legislature contemplated. Specifically, plaintiff does not apply the methodology for construing statutes, as set out in *PGE*, 317 Or. at 610-12. It also does not adequately address defendants' reliance on legislative history, which indicates that ORS 377.756 was intended to allow cities and counties to erect signs welcoming visitors and advertising attractions in the community. *See* Minutes, House Committee on Transportation, HB 3301, April 2, 1987, p. 2.[26]

Plaintiff does not explain why cities and counties should not be allowed such signs, nor does it address

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[26] *See PGE*, 317 Or. at 611-612 (if legislative intent is unclear after examining text and context, then, and only then, may the court consider legislative history).

whether those signs are consistent with the statute's overall "on-premises" exception. *See* ORS 377.756(2) and (3) (requiring that such signs be "within the city limits" or "within one mile of the community growth boundary as designated by the county"). In the absence of such analysis, plaintiff's argument is not capable of review. *State v. Montez*, 309 Or. 564, 604, 789 P.2d 1352 (1990).

To summarize, the application of the OMIA to plaintiff's first billboard did not deny plaintiff the right to free speech, due process or equal protection, nor impose a prior restraint. Accordingly, the trial court properly granted defendants' motion for summary judgment on plaintiff's section 1983 civil rights action.[27]

Plaintiff's third claim is a declaratory judgment action in which plaintiff again raises numerous challenges to the OMIA and seeks injunctive relief against the department's attempts to remove plaintiff's second and third billboards. The second billboard is located along Interstate 5 near Ashland. Plaintiff removed a sign from that billboard after being ordered to do so by the department and replaced it with a religious message.The third billboard is located near Route 62 in Jackson County. When the department notified plaintiff that this billboard was in violation of the OMIA, plaintiff sought a hearing. However, there is no indication in the record whether such a hearing was ever held.

The trial court granted the department summary judgment on the declaratory judgment action. On appeal,

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[27] Because we reject plaintiff's civil rights claims on their merits, we do not address the issue of qualified immunity.

the department contends that this claim is procedurally barred because plaintiff did not seek a hearing pursuant to ORS 377.775 and therefore did not exhaust its administrative remedies. Although the department raised "exhaustion" as an affirmative defense in its answer, it did not assert it as a ground for summary judgment. Plaintiff was therefore denied the opportunity to develop a complete factual record on that issue for appeal, and we decline to affirm on those grounds. *State v. Ysasaga*, 146 Or. App. 74, 78, 932 P.2d 1182 (1997); *State v. Knox*, 134 Or. App. 154, 160-61, 894 P.2d 1185 (1995).[28]

Nonetheless, many of the constitutional challenges plaintiff raises in its declaratory judgment action were disposed of under its section 1983 claim.[29] Accordingly, we address only those contentions that are not common to the second claim. The first of these involves Article I, section 20, of the Oregon Constitution, which provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities,

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[28] For example, the trial court's order granting summary judgment included a "stipulation" that plaintiff "made a timely request for an administrative hearing upon receipt of the notice of violation regarding the third structure." It is doubtful whether that alone established that plaintiff exhausted its administrative remedies: the record does not indicate whether plaintiff followed through on its request or what was the outcome of that hearing. Because the department did not assert exhaustion as a ground for summary judgment, plaintiff was not on notice of the need to present additional evidence on that issue.

[29] Plaintiff makes the same First Amendment, Article I, section 8, prior restraint and equal protection arguments in both the second and third claims.

> which, upon the same terms, shall not equally belong to all citizens."

As under its equal protection argument, plaintiff asserts that the "grandfather clause" in ORS 377.765 unconstitutionally grants a privilege to a class of citizens that is not equally available to all. We disagree.

Allowing off-premises permits for billboards that existed on or before June 12, 1975, ORS 377.765, does not implicate Article I, section 20, because it does not involve a "true class."

> "In evaluating whether a class exists under Article I, section 20, we must first determine whether the class 'is created by the challenged law itself' or 'by virtue of characteristics * * * apart from the law in question.' * * * Classes of the first type are entitled to no special protection and, in fact, are not even considered to be classes for the purposes of Article I, section 20." *Sealey v. Hicks*, 309 Or. 387, 397, 788 P.2d 435, *cert den* 498 U.S. 819 (1990) (citations omitted).

In *Ag West Supply v. Hall*, 126 Or. App. 475, 480, 869 P.2d 383 (1994), we held that a statute that "grandfathered" in pre-1991 customers of cardlock gas stations was not based on characteristics apart from the law itself and therefore did not create a true class for purposes of Article I, section 20. The same is true here. The "class" of persons or entities that owned billboards on or before June 12, 1975 was created by the OMIA itself. Because there is no true class, there is no constitutional violation. *Id.*

As with its equal protection argument, plaintiff also asserts that ORS 377.756 violates Article I, section 20,

because it grants civic or nonprofit applicants a "special privilege" by allowing then to "get permits to display any speech they want." For the same reasons that we rejected plaintiff's equal protection claim, 150 Or. App. at 124-25, we decline to address its argument under Article I, section 20.

Plaintiff's assertions that the OMIA is "vague" and was applied in an arbitrary manner also do not merit discussion. The trial court therefore properly granted the department's motion for summary judgment on plaintiff's declaratory judgment action.

Affirmed.

IN THE SUPREME COURT OF THE STATE OF OREGON

JEFFREY HERSON, dba BYNX, dba Outdoor Media Dimensions, Inc.,	)	Agency Nos. 53190; 50346; 50347; 52290; 52293, 54811; 53752; 54021; 54581; 56088; 49403
Petitioner, Petitioners on Review,	)	
v.	)	SC S46824 CA A98243
DRIVER AND MOTOR VEHICLE SERVICES BRANCH (DMV),	)	**ORDER DENYING MOTION TO REINSTATE AND DENYING PETITION FOR REVIEW**
Respondent, Respondent on Review.	)	

Upon consideration by the court.

By order dated November 30, 1999, the court held the petition for review in this case in abeyance pending its decision in *Outdoor Media Dimensions, Inc. v. State*, 150 Or App 106, 945 P2d 614 (1997), *rev allowed* 326 Or 627 (1998). The Court issued its decision *Outdoor Media Dimensions, Inc. v. State* on March 8, 2001, and the appellate judgment issued on April 12, 2001.

Petitioners on review have moved to reactivate this case. The motion is denied as moot. The petition for review is denied.

DATED this 17th day of April, 2001.

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
Chief Justice

Kulongoski, J., and De Muniz, J., not participating.

c: Charles F. Hinkle
Michael D. Reynolds

Supreme Court, U.S.
FILED
OCT 12 2001
CLERK

(2)

No. 01-64

In the Supreme Court of the United States

OCTOBER TERM, 2001

JEFFREY HERSON, DBA BYNX and DBA OUTDOOR MEDIA DIMENSIONS, INC.,

Petitioners,

v.

DRIVER AND MOTOR VEHICLE SERVICES DIVISION (DMV),

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of the State of Oregon

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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23p

QUESTIONS PRESENTED

1. Whether the Court should deny the petition when the state court of last resort has not ruled on any of the constitutional questions presented by petitioners, when the state statutes petitioners cite have since been amended, and when petitioners do not claim that provisions such as those of the state's former statutes are in force elsewhere.

2. Whether the Court should deny the petition when the state appellate court's interpretation of the state statutes is at odds with petitioners' and when petitioners' arguments are based solely on their own statutory interpretation.

3. Whether the Court should deny the petition when petitioners claim that there are direct conflicts between the state appellate court's decisions and decisions from this Court and from other federal courts of appeal, but when those conflicts are all illusory and disappear on closer examination.

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STATEMENT OF THE CASE

This case involves the 1991 version of the Oregon Motorist Information Act (OMIA), ORS 377.700 *et seq.* (Pet. 2).[1] The 1991 statutes implicitly distinguished between on-premises and off-premises (or "outdoor advertising") signs, allowing on-premises signs without a permit, but allowing off-premises signs only with a permit. *See Outdoor Media Dimensions, Inc. v. State of Oregon,* 150 Or. App. 106, 108–09, 945 P.2d 614 (1997) (describing 1991 statutory scheme), *aff'd on other grounds* 331 Or. 634, 20 P.3d 180 (2001).

This case began when the state agency notified petitioners that several of their billboards or "outdoor advertising" signs, which had been erected along state highways without a permit, violated the OMIA. The notices warned that the signs would be removed unless petitioners requested a hearing. (Final Order 3, 7–8; DMV Ex. 3). Petitioners timely requested a hearing and, following a contested case proceeding, the agency issued its final order, determining that petitioners' signs violated the statutes and ordering their removal. *Herson v. DMV,* 157 Or. App. 683, 685, 971 P.2d 492 (1998), *review denied* 332 Or. 56 (2001).

Petitioners then sought judicial review before the state Court of Appeals. Before that court, petitioners argued *inter alia* that the 1991 version of the OMIA was unconstitutional because it violated the First and Fourteenth Amendments.[2] Petitioners claimed that the OMIA was unconstitutional be-

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[1] As explained below, the statutes have since been amended and were last amended in 1999. Or. Laws 1999, ch. 877.

[2] Petitioners also contended that one of their signs did not violate the OMIA because it was not an "outdoor advertising" sign within the meaning of the statute. (App. Br. 38-39). Petitioners do not raise that claim in their petition filed with this Court.

cause it supposedly favored commercial speech over non-commercial speech, because it allegedly permitted some non-commercial speech where other non-commercial speech was prohibited, and because it did not provide for a prompt administrative decision on an application for a permit. (Pet. 6). Relying on its decision in an earlier case involving similar challenges, the state Court of Appeals rejected those claims. In this case, the court simply noted that it already had decided those issues in its earlier *Outdoor Media Dimensions* decision and that it "adhere[d] to those rulings" here. *Herson,* 157 Or. App. at 685, citing *Outdoor Media Dimensions Inc.,* 150 Or. App. 106. Petitioners then sought review in the state Supreme Court, which denied review without comment. *Herson,* 332 Or. 56.

In its prior *Outdoor Media Dimensions* decision, the state appellate court rejected claims similar to those advanced in the petition filed in this case.[3] Interpreting the state statutes, the court held that the OMIA does not distinguish between commercial and non-commercial speech nor "favor commercial over non-commercial speech[.]" 150 Or. App. at 114. Instead, the pivotal distinction drawn in the statutes is the distinction between on-premises and off-premises (or "outdoor advertising") signs. While off-premises signs require a permit, and on-premises signs do not, ORS 377.725(1) (Pet. 2–3), both on- and off-premises signs can contain either commercial or non-commercial speech. ORS 377.710(22).[4] Thus, as the

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[3] Outdoor Media Dimensions was the plaintiff in that case. Outdoor Media Dimensions also is one of the petitioners in this case.

[4] Under the 1991 version of the statute, off-premises or "outdoor advertising" signs are those that advertise "[g]oods, products or services which are not sold, manufactured or distributed on or from the premises on which the sign is located" or "[f]acilities not located on the premises on which the sign is located."

state court held, the OMIA does not favor commercial over non-commercial speech. An on-premises sign can be either commercial or non-commercial in nature, and an off-premises sign requires a permit whether it is non-commercial or commercial. *Outdoor Media Dimensions Inc.*, 150 Or. App. at 114 ("the OMIA's on-premises exception applied equally to commercial and non-commercial billboards").

In *Outdoor Media*, petitioners claimed that the OMIA allows some non-commercial speech where it prohibits other non-commercial speech. The court disagreed with that reading of the state statutes. 150 Or. App. at 116–17. The court concluded that "the OMIA's on-premises/off-premises distinction" does not impose "a content-based restriction on speech[.]" *Id.* at 117. The court held that "it is not the content, subject or viewpoint of [the sign's] message that determines whether a permit is required." *Id.*

Finally, the state Court of Appeals also disagreed with Outdoor Media's claim that the OMIA "is * * * flawed because it does not provide that the department must approve or deny an application for a relocation permit 'within a specified brief period' of time." 150 Or. App. at 120. The court held that "the OMIA's relocation and transfer provisions do not require the [state] department to review the content of a billboard's message, nor do they represent a legislative attempt to classify and restrict speech on the basis of content." *Id.* at 121. "[T]he OMIA's permit requirement is not content-based," the court concluded, "and the relocation and transfer provisions apply to all billboards, regardless of their messages." *Id.* at 122. Based on its reading of state law, the Court of Appeals rejected all of the plaintiff's challenges to the OMIA.

As explained in more detail below, on review the state Supreme Court found it did not need to decide the merits of these constitutional issues. Instead, the Supreme Court based

its decision on narrower and more case-specific grounds. *Outdoor Media Dimensions, Inc.*, 331 Or. at 654–57. To date, the state Supreme Court has never ruled on the constitutional issues raised in this petition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioners complain about decisions rendered by the state's intermediate Court of Appeals; the state Supreme Court has never ruled on these issues; in addition, the pertinent statutes have since been amended.

In arguing that the state statutes are unconstitutional and that state court decisions conflict with those of other courts, including this one, petitioners rely on two decisions of the state Court of Appeals: the one reached in this case, and the one it rendered in its earlier *Outdoor Media* decision. (Pet. 1, 7–11). *Herson,* 157 Or. App. 683; *Outdoor Media Dimensions, Inc.*, 150 Or. App. 106. As discussed below, petitioners mischaracterize the basis for those decisions. Setting that point aside for the moment, it bears emphasis that petitioners' complaints are aimed solely at decisions rendered by the state's intermediate Court of Appeals. As noted above, the state Supreme Court has never resolved the issues that petitioners contend were wrongly decided by the Court of Appeals.

Petitioners contend (erroneously) that in the *Outdoor Media Dimensions* case the state appellate court upheld a statutory scheme that supposedly violated the First Amendment by favoring commercial over non-commercial speech and by permitting some non-commercial speech where other non-commercial speech was banned. (Pet. 7, 9–10). They also assert that the state's permit requirement for outdoor advertising signs violates due process. (Pet. 10–11). The state Court of Appeals resolved those issues, but on review the state Su-

preme Court did not. Instead, the court determined that it did not need to reach the merits of the issues.

Specifically, in *Outdoor Media* the state Supreme Court did not decide whether the OMIA violated the First Amendment. In that case, the plaintiffs brought claims under 42 U.S.C. section 1983, asserting violations of the First and Fourteenth Amendments. The court resolved the plaintiff's claims by concluding that the state had been entitled to summary judgment based on its defense of qualified immunity. *Outdoor Media Dimensions, Inc.,* 331 Or. at 655–57. That holding required the court to determine only that in 1993 and 1994, when the challenged state conduct had occurred, "the state of the law respecting the manner in which governments may regulate billboards without infringing on free speech rights" was "unsettled." *Id.* at 657. Because the law was unsettled, state officials had not "'violated clearly established * * * constitutional rights of which a reasonable person would have known.'" *Id.* at 656, quoting *Conn v. Gabbert,* 457 U.S. 286, 290 (1999) (internal quotation marks and additional citation omitted). Thus, the state Supreme Court did not need to, and did not, decide whether the OMIA violates the First Amendment. *Id.* at 657.

In *Outdoor Media,* the state Supreme Court also did not decide whether the permit requirement was an unconstitutional prior restraint, as petitioners claim. Rather than deciding the merits of that issue—as the Court of Appeals had, 150 Or. App. at 119–22—the state Supreme Court held that "[t]he problem with [the plaintiff's section 1983] argument relate[d] to causation." 331 Or. at 654. The court explained that:

> Plaintiff advances its argument in the context of plaintiff's claim for money damages under section 1983—damages that plaintiff alleges resulted from the state's violation of plaintiff's constitutional rights. Plaintiff,

> however, neither pleaded nor argued that the state's application of the OMIA's permit and hearing provisions *caused* plaintiff's alleged damages. To prevail on its section 1983 claim, plaintiff must prove that the asserted constitutional violation caused the damages that plaintiff seeks to recover. *See, e.g., Brower v. Inyo County*, 489 US 593, 599, 109 S Ct 1378, 103 L Ed 2d 628 (1989) (discussing requirements of proximate causation with respect to section 1983 claims).
>
> As noted, plaintiff's alleged damages do not derive from the lack of time limits under the OMIA for obtaining permits or judicial access. * * * Plaintiff does not argue that, had the state given it more time, plaintiff would have been able to secure a permit.
>
> On these facts, it is the validity of the permit requirement—which is not at issue respecting this alleged constitutional violation—and not the lack of time constraint, that we must address in deciding plaintiff's claim for monetary damages under section 1983. Plaintiff's prior restraint theory, therefore, is misplaced.

Id. at 654–55 (emphasis in original; footnote omitted).

Thus, in *Outdoor Media* the state Supreme Court did not reach or decide any of the issues that petitioners contend the Court of Appeals got wrong both in that case and in this one. Instead, after the Court of Appeals decisions in *Outdoor Media* and in this case, the state Supreme Court determined that it did not need to reach the merits of those issues in the *Outdoor Media* case. In this case, the state Supreme Court simply denied review. That court never has decided the issues raised by petitioners here.

Presumably, this Court could issue a writ even though the state court of last resort has not considered or decided the is-

sues. *But see* Rule 10(b) (writ may issue when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals"). But the fact that the state's highest court has not ruled on the issues is a factor that should weigh against issuance of a writ. If the state Supreme Court had to decide the constitutional issues presented here, it might not construe the statutes in the same way that the state Court of Appeals did. The court also might decide the case based on a provision of the state constitution, such as Article I, section 8, of the Oregon Constitution,[5] without relying on federal law. Alternatively, even if the court reached the federal constitutional issues it might not agree with the appellate court's decision on those constitutional issues. Thus, the fact that the state Supreme Court has not ruled on the issues—and that no one can be certain how and on what basis it would rule if directly confronted with the issues—weighs against granting the petition.

That same point can be made by approaching it from a somewhat different angle. Among the petitioners in this case is Outdoor Media Dimensions, one of petitioner Jeffrey Herson's "dbas." Outdoor Media Dimensions was the plaintiff in the state-court *Outdoor Media Dimensions* case. One notable feature of the petition filed with the Court in this case is that its complaints are directed principally at the Oregon Court of Appeals *Outdoor Media Dimensions* decision, rather than at

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[5] Article I, section 8, provides that: "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever; but every person shall be responsible for the abuse of this right." The state Supreme Court has adopted its own unique methodology for analyzing challenges brought under this state constitutional provision. *See, e.g. State v. Robertson*, 293 Or. 402, 649 P.2d 569 (1982) (outlining that methodology).

the decision rendered by that court in this case. Presumably, petitioners did not seek the issuance of a writ in the *Outdoor Media Dimensions* case because ultimately the state Supreme Court did not reach the merits of or endorse the rulings that petitioners contend the state appellate court got wrong. Had Outdoor Media Dimensions sought this Court's review in the *Outdoor Media* case, the state would have responded by noting that the petitioner was challenging the intermediate court's decision only, not the state Supreme Court's, and by emphasizing that the state Supreme Court resolved the case on different grounds. The petition filed in this case represents little more than an indirect attempt to evade that response. The attempt should not prove successful simply because petitioners have followed an indirect route.

It is apparent that petitioners' real complaint is focused on the state Court of Appeals *Outdoor Media Dimensions* decision, not on this case. In this case, the court simply said that it "adhere[d] to [its earlier] rulings." (Pet, App. 2). The state Supreme Court's decision denying review in this case does not signal that the court agrees with the Court of Appeals rulings on the constitutional issues raised here. *See 1000 Friends of Oregon v. Bd. of Co. Comm.*, 284 Or 41, 44, 47, 584 P.2d 1371 (1978) (denial of review does not imply that Court of Appeals decision is correct). Although the court did not give a reason for its decision to deny review in this case, the change in the pertinent state statutes may well have been a factor in the court's decision.

In sum, because the state Supreme Court has not endorsed the appellate court's decision on the constitutional issues raised here, it would be premature for this Court to review the conclusions reached by the state's intermediate appellate court. The fact that the state Supreme Court has not ruled on these issues is a factor that weighs against granting the petition. That is especially so because the state statutes have since

been amended, and because petitioners do not claim that other states or municipalities have followed the decisions of Oregon's Court of Appeals or that statutes such as the 1991 version of the OMIA are common elsewhere.

As noted above, this case involves the 1991 version of the OMIA that has since been amended. At least in some respects, petitioners' arguments focus on portions of the 1991 statutes that are no longer in effect. In particular, both in their petition and in their briefs filed in state court, petitioners have relied on the exemptions that were set out in ORS 377.735(1) (1991). (*See, e.g.,* Pet. 3–5, 7, App. 2–3).[6] Those exemptions provide the basis for their assertion that the statutes favor commercial over non-commercial speech and permit some, but not all, non-commercial speech on off-premises signs. The 1999 amendments to the OMIA eliminated almost all of those exemptions. The only signs now exempted are on-premises signs (which implicitly were exempted under the 1991 statutes, and which are exempted without regard for content), signs of governmental units, and certain temporary signs on private property. ORS 377.735(1) (1999).[7]

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[6] The 1991 version of the statute is set out in the petition. (Pet. 3–5).

[7] ORS 377.735(1) (1999) provides that:

(1) If applicable federal requirements as of October 23, 1999, are met, the permit requirements of ORS 377.700 to 377.840 do not apply to:

(a) Signs of a governmental unit, including but not limited to traffic control or regulatory devices, legal notices or warnings.

(b) A temporary sign on private property if:

(A) The sign does not exceed 12 square feet;

(B) The sign is not on a permanent base;

(C) The sign does not remain in place for a period of more than 60 days in a calendar year, except that a sign erected by a

Footnote continued...

The change in the statutes does not mean that petitioners' claims are moot, *see City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288–89 & n. 10 (1982) (voluntary repeal of law does not necessarily moot challenges to it), or that this Court could not issue a writ. The change in the statutes is simply another factor that weighs against allowing the petition. The statutory exemptions on which petitioners focus at least part of their argument are no longer in the state statutes. If those exemptions were problematic or troubling in any respect, they are no longer in force. Petitioners do not claim that such exemptions are a common feature in similar statutes or that there is some other pressing reason why this Court should consider the issues in this case despite the change in the state statutes. This Court has little reason to issue a writ to decide only this individual case that is based on state statutes that have since been recast.

In sum, because petitioners rely on cases from the state's intermediate Court of Appeals and on rulings that have not been reviewed on their merits by the state Supreme Court, and because petitioners challenge state statutes that have since been amended, the petition should not be allowed in this case.

(...continued)

resident on the resident's residential property may remain in place for longer than 60 days in a calendar year;

(D) No person receives compensation for displaying the sign; and

(E) The sign complies with ORS 377.720 [setting out lighting, location, and other requirements].

(c) On-premises signs.

II. Petitioners' arguments depend on erroneous readings of state law.

Petitioners' argument that the OMIA violates the First Amendment is based on the apparent assumptions that the statutes give greater protection to commercial than to non-commercial speech and that the statutes permit some non-commercial speech where they ban other non-commercial speech. (Pet. 7). Petitioners do not clearly explain why they believe the OMIA favors commercial speech or why they contend it treats some non-commercial speech more favorably. Instead, they simply assert that the OMIA makes those distinctions. Both of their assumptions about the OMIA, however, appear to be based on a misreading of state law that conflicts with the state court's interpretation of the statutes.

As noted above, the pivotal distinction drawn in the OMIA is the distinction between on-premises and off-premises (or "outdoor advertising") signs. Off-premises signs require a permit, while on-premises signs do not. ORS 377.725(1). Under the 1991 statutes, both on- and off-premises signs could be either commercial or non-commercial.[8] The Oregon Court of Appeals has held, as a matter of statutory interpretation under state law, that "the

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[8] The same is true with respect to the 1999 version of the statutes. The 1999 version of the OMIA defines an "on-premises" sign as one that is "designed, intended or used to advertise, inform or attract the attention of the public as to" "[a]ctivities conducted on the premises on which the sign is located" or "[t]he sale or lease of the premises on which the sign is located." ORS 377.710(22) (1999). An off-premises or "outdoor advertising" sign is one "designed, intended or used to advertise, inform or attract the attention of the public to" "[g]oods, products or services which are not sold, manufactured or distributed on or from the premises on which the sign is located," "[f]acilities not located on" those premises, or "[a]ctivities not conducted on" the premises. ORS 377.710(23) (1999).

OMIA does not favor commercial over non-commercial speech" because "the OMIA's on-premises exception applies equally to commercial and non-commercial billboards." *Outdoor Media Dimensions Inc.*, 150 Or. App. at 114. Petitioners' argument ignores, and is at odds with, this interpretation of state law.

As an example of the OMIA's supposed preference for commercial over non-commercial speech, petitioners assert that:

> [a] sign at the site of a restaurant with a commercial message of "Hamburgers Sold Here" is not an outdoor advertising sign and, hence, may be displayed without a permit. However, a sign at the same site with the noncommercial message of "Attend First Baptist Church" or "Ban Abortions" is an outdoor advertising sign and, hence, [may be] banned without a permit.

(Pet. 7). That assertion appears to be factually correct, as far as it goes, but it may be intended to suggest a distinction that the state statutes do not make. Under the OMIA, a sign hawking hamburgers cannot be displayed off-premises at a church (unless the church is holding a hamburger feed) and one inviting church attendance similarly cannot be displayed off-premises at a hamburger stand. But the sign urging church attendance can be displayed on church premises,[9] the "ban abortions" sign can be posted at the headquarters of the Ban Abortions Committee, and the hamburger stand also can advertise its wares onsite. As the state appellate court has held, the statutory distinction is not one made between commercial

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[9] In *Outdoor Media*, the state court specifically concluded that "a sign reading 'Attend First Baptist Church,' posted at the church," would be a permissible on-premises sign. 150 Or. App. at 115 n. 10.

and non-commercial speech, but between on-premises and off-premises signs.

The statutes also do not favor some non-commercial speech over other non-commercial speech, as petitioners suggest. (Pet. 7). As noted, the Oregon Court of Appeals has rejected such a claim based on its reading of state law. *Outdoor Media*, 150 Or. App. at 116–17. Petitioners give the following example of the favoritism they contend is created by the statutes.

> [A]t a vacant lot, under the exemption contained in ORS 377.735(1)(g),[10] a sign with the noncommercial message of "Attend the High School Back to School Night on October 6" may be displayed without a permit, but the noncommercial message of "Attend First Baptist Church" is banned without a permit.

(Pet. 7). Petitioners may be correct about those two signs (assuming that the school sign is posted for no more than two weeks), but the statutory distinction is not one made between different types of non-commercial speech, as petitioners appear to suggest. Instead, the distinction made is one between temporary signs, posted for no more than two weeks, and more permanent ones. Again, petitioners misread state law and their interpretations of the state statutes conflict with those of the state court.

Petitioners also contend that the "permit requirement" in the OMIA amounts to an impermissible prior restraint. (Pet. 8–9). Petitioners' argument again appears to be based on a mistaken interpretation of state law. Petitioners' argument

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[10] That 1991 statute provided for an exception for "[s]igns maintained for not more than two weeks announcing an auction or a campaign, drive or event of a civic, philanthropic or educational organization."

seems to be based on the view that obtaining a permit is an initial hurdle that must be cleared in order to erect or maintain an "outdoor advertising" or off-premises sign. Based on that view, petitioners argue that the OMIA does not provide adequate due process because the permitting decision need not be made in any specified amount of time. (Pet. 10).

That argument misapprehends the nature and purpose of the permit requirement under the OMIA, which operates as a numerical and geographic limitation on off-premises "outdoor advertising" signs. Such signs are permitted only in commercial and industrial zones, and the number of signs is effectively limited by the number of outdoor advertising signs in existence in 1975. *See Outdoor Media Dimensions Inc.*, 150 Or. App. at 117 ("ORS 377.705(14) effectively places a cap on the number of highway billboards in Oregon by denying permits for the installation of new billboards after June 12, 1975"). Unless an outdoor advertising sign fits within those geographic and numerical limitations, a permit can be obtained only by transfer from one person to another. ORS 377.725(2). This is not a permit requirement in the usual sense. Petitioners' inability to get a permit is not due to any delay in the permitting process, but to the fact that their signs are off-premises ones that are in the wrong places and that do not fit within the terms of the act's grandfather provisions.

In sum, petitioners' arguments are based on mistaken interpretations of state law that are at odds with the interpretation given to those statutes by the state appellate court. When the state court's interpretations of state law are substituted for petitioners', the main props of their arguments fall away. In addition, the state court's reading of state law would impede this Court's ability to reach and decide the constitutional issues petitioners urge on the Court. The fact that petitioners' arguments are at odds with the state court's reading of state

law is another factor that counsels against the issuance of a writ in this case.

III. On closer examination, the decisional conflicts that petitioners seek to identify disappear.

A. The supposed *Metromedia* conflict

Petitioners argue that there is a "direct conflict" between some of the federal circuit courts of appeal and the Oregon court "as to whether the test set forth by Mr. Justice White in [the plurality opinion in] *Metromedia* * * * is an appropriate test under the First Amendment." (Pet. 9). In addition to the Oregon Court of Appeals decisions cited and discussed above, petitioners cite decisions from the third and fourth circuits that supposedly conflict with cases from the first, second and ninth circuits. (Pet. 9).

Petitioners do not clearly identify what they mean by "the test set forth" in the plurality opinion in *Metromedia.* As a general matter, "[t]he *Metromedia* decision was badly splintered, producing five separate opinions." *Rappa v. New Castle County,* 18 F.3d 1043, 1057 (3d Cir. 1994), describing *Metromedia, Inc. v. San Diego*, 543 U.S. 490 (1981). *See also Outdoor Media Dimensions Inc.,* 150 Or. App. at 113–14 (quoting the Third Circuit's decision in *Rappa* and making the same point).

Some aspects of the *Metromedia* plurality opinion seem rather uncontroversial, however, and petitioners appear to be relying on those aspects of the decision. (Pet. 7, 9–11). For example, every supposedly conflicting case cited by petitioners, including the Oregon decisions, either accepts that commercial speech cannot be favored over non-commercial speech or finds that the law under examination does not create any such favoritism. *Rappa*, 18 F.3d at 1056 (commercial speech not favored); *Matthews v. Town of Needham,* 764 F.2d 58, 61 (1st Cir. 1985) (relying on *Metromedia* for proposition

that commercial speech cannot be favored over non-commercial speech); *National Advertising Co. v. Town of Babylon*, 900 F.2d 551, 556 (2d Cir.), *cert denied* 498 U.S. 852 (1990) (same); *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1169 (4th Cir. 1991), *cert denied* 504 U.S. 931 (1992) (rejecting claim that terms "commercial" and "non-commercial" are vague); *National Advertising Co. v. City of Orange*, 861 F.2d 246, 248 (9th Cir. 1988) (total ban on off-premises commercial billboards is permissible under *Metromedia;* commercial speech not favored over non-commercial).[11]

The Oregon cases are not to the contrary. In *Outdoor Media*, the court concluded that "the OMIA does not favor commercial over non-commercial speech." 150 Or. App. at 114. In the present case, the Oregon court simply relied on its earlier decision. *Herson*, 157 Or. App. at 685. Thus, although petitioners insist that there is a "direct conflict" between these various decisions, any possible conflict simply disappears on closer examination.

Petitioners also appear to rely on the *Metromedia* plurality's decision that government cannot permit some non-commercial speech where it bans other non-commercial speech. (Pet. 7, citing *Metromedia*, 453 U.S. at 514–15). They do not appear to contend that there is any decisional conflict on that point, however. (Pet. 9–10). Moreover, even if there were any such conflict, the Oregon decisions would be on the *Metromedia* side of the line. In its *Outdoor Media* decision, the Oregon court rejected the claim that the OMIA creates content-based distinctions. 150 Or. App. at 117.

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[11] In *City of Ladue v. Gilleo*, 512 U.S. 43, 49 (1994)—also cited by petitioners—this Court agreed that *Metromedia* stands for the proposition that a complete ban on offsite commercial billboards is permissible.

Thus, although petitioners hint at supposed conflicts, none is apparent. The results of some of these cases may differ, due to differing provisions in the various sign laws at issue, but the analytical confusion and disagreement that petitioners suggest does not appear to exist. In particular, the Oregon decisions regarding the OMIA do not appear to conflict with this Court's decisions or with decisions from other federal appellate courts.

B. The claimed conflict with this Court's decision in *FW/PBS, Inc.*

Petitioners' final claim is that the Oregon court's decisions are in conflict with the plurality opinion in *FW/PBS, Inc.* and with a decision from the Ninth Circuit. (Pet. 10–11). Again, the claimed conflict seems to disappear when the cases are examined.

In *Outdoor Media*, the state appellate court distinguished the plurality opinion in *FW/PBS, Inc.*, and held that no time limit need be imposed on the permitting decision under the OMIA "because the OMIA's relocation and transfer provisions do not require the [state agency] to review the content of a billboard's message, nor do they represent a legislative attempt to classify and restrict speech on the basis of content." 150 Or. App. at 121. That decision does not conflict with *FW/PBS, Inc.* "The core policy" underlying decisions such as *FW/PBS* is that "undue delay [may] result[] in the unconstitutional suppression of protected speech." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 228 (1990). Here, however, because the on-premises/off-premises distinction is not content-based, any delay will not result in the unconstitutional suppression of protected speech. In addition, as discussed above, the so-called "permit requirement" of the OMIA is not a permit requirement in the usual sense. Rather, the requirement represents the act's geographical and numerical limitations on

"outdoor advertising" signs. Government delay is not a factor. If a sign does not otherwise comply with the act, the only way to get a permit is to obtain one by transfer from someone else who has one.

Outdoor Systems, Inc. v. City of Mesa, 997 F.2d 604 (9th Cir. 1993), also cited by petitioners, does not create the conflict that petitioners seek. In holding that "the failure to specify the time period for processing permit applications" was "not fatal," the court relied heavily on the fact that the appellants had "not cited one case" in support of their claim. 997 F.2d at 613.

CONCLUSION

For the reasons stated above, the petition for certiorari should be denied.

Respectfully submitted,

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